Supreme Court, U.S.
FILED
MAY 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-998

In the Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND, APPELLANT

v.

J.A. CROSON COMPANY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE

CHARLES FRIED
Solicitor General
WM. BRADFORD REYNOLDS
Assistant Attorney General
DONALD B. AYER
Deputy Solicitor General
ROGER CLEGG
Deputy Assistant Attorney General
GLEN D. NAGER
Assistant to the Solicitor General
DAVID K. FLYNN
MICHAEL P. SOCARRAS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

35 pp

QUESTION PRESENTED

Whether the Richmond city ordinance, which requires every nonminority prime construction contractor to subcontract at least 30% of the value of its city contracts to minority business enterprises, violates the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	6
Argument:	
The Richmond city ordinance, which requires every non-minority prime construction contractor to subcontract at least 30% of the value of its city contracts to minority business enterprises, violates the Equal Protection Clause of the Fourteenth Amendment	8
A. Laws which classify on the basis of race should be sustained only if "narrowly tailored" to achieve a "compelling" interest, regardless of the identity of the plaintiff challenging them or the purpose for which they are adopted	8
B. Appellant's ordinance is not "narrowly tailored" to the accomplishment of a "compelling" governmental purpose	11
C. The Court's decision in *Fullilove* does not support the constitutionality of this MBE preference ordinance	25
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Associated Gen. Contractors v. *City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987)	23, 28
Brown v. *Board of Educ.*, 347 U.S. 483 (1954)	8, 14
City of New Orleans v. *Dukes*, 427 U.S. 297 (1976)	15
City of Renton v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986)	21
Defunis v. *Odegaard*, 416 U.S. 312 (1974)	15
Dothard v. *Rawlinson*, 433 U.S. 321 (1977)	20
Fullilove v. *Klutznick*, 448 U.S. 448 (1980)	*passim*
General Bldg. Contractors Ass'n v. *Pennsylvania*, 458 U.S. 375 (1982)	20

Cases – Continued: Page

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 20
Hampton v. *Mow Sun Wong*, 426 U.S. 88 (1976) 28
Hazelwood School Dist. v. *United States*, 433 U.S. 299 (1977) 18
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 14
Hirabayashi v. *United States*, 320 U.S. 81 (1943) 9
Johnson v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987) 20, 23
Korematsu v. *United States*, 323 U.S. 214 (1944) 8-9
Lee v. *Washington*, 390 U.S. 333 (1968) 9
Local 28, Sheet Metal Workers' Int'l Ass'n v. *EEOC*, 478 U.S. 421 (1986) 21, 22
Loving v. *Virginia*, 388 U.S. 1 (1967) 8, 9
Mississippi Univ. for Women v. *Hogan*, 458 U.S. 718 (1982) 11
Palmore v. *Sidoti*, 466 U.S. 429 (1984) 8, 9
Parker v. *Levy*, 417 U.S. 733 (1974) 25
Pasadena City Bd. of Educ. v. *Spangler*, 427 U.S. 424 (1976) 20
Personnel Administrator v. *Feeney*, 442 U.S. 256 (1979) 13
Regents of the Univ. of California v. *Bakke*, 438 U.S. 265 (1978) 1, 11, 12, 14, 15-16
Roberts v. *United States Jaycees*, 468 U.S. 609 (1984) 13-14
Runyon v. *McCrary*, 427 U.S. 160 (1976) 17
Shelley v. *Kraemer*, 334 U.S. 1 (1948) 11
Strauder v. *West Virginia*, 100 U.S. 303 (1879) 8
Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) 9
United Jewish Orgs. v. *Carey*, 430 U.S. 144 (1977) 9
United States v. *Paradise*, No. 85-999 (Feb. 25, 1987) 9, 10, 11, 13, 21, 22
United Steelworkers v. *Weber*, 443 U.S. 193 (1979) 20
Washington v. *Davis*, 426 U.S. 229 (1976) 13, 20
Wygant v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) .... *passim*
Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 11

Constitution and statutes:

U.S. Const.:
Art. I:
§ 8, Cl. 1 (Spending Clause) 27
§ 8, Cl. 3 (Commerce Clause) 27
Amend. V (Due Process Clause) 7, 27
Amend. XIII 27
Amend. XIV (Equal Protection Clause) ..... *passim*
Civil Rights Act of 1964:
Tit. VII, 42 U.S.C. 2000e *et seq.* 19, 20
42 U.S.C. 2000e-5(f)(1) 1
Tit. IX, 42 U.S.C. 2000h-2 1
Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 20
§ 103, 91 Stat. 117 ..... 25, 26
Voting Rights Act of 1965, § 5, 42 U.S.C. 1973c 9
42 U.S.C. 1981 ..... 4, 20, 24
42 U.S.C. 1983 4

Miscellaneous:

Days, *Fullilove*, 96 Yale L.J. 453 (1987) 11
The Federalist No. 10 (C. Rossiter ed. 1961) 28
C. Wright & A. Miller, *Federal Practice & Procedure* (1971) 17

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-998

CITY OF RICHMOND, APPELLANT

v.

J.A. CROSON COMPANY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE

INTEREST OF THE UNITED STATES

The United States is responsible for enforcing numerous statutes prohibiting discrimination on the basis of race or national origin (see, *e.g.*, 42 U.S.C. 2000e-5(f)(1)), and may intervene in cases brought under the Fourteenth Amendment (see, *e.g.*, 42 U.S.C. 2000h-2). The United States has in the past participated both as a party and as an amicus curiae in cases presenting constitutional claims of race discrimination. See, *e.g.*, *Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265 (1978); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986). The Court recently invited the Solicitor General to present the views of the United States in another case involving a constitutional challenge to a minority business enterprise program. See *H.K. Porter Co.* v. *Metropolitan Dade County*, No. 87-1001.

STATEMENT

1. Appellant, the City of Richmond, Virginia, has a population that is over 50% minority, of which blacks are by far the

largest group (J.A. 12, 29; J.S. Supp. App. 207). In early 1983, appellant released a study indicating that, notwithstanding this heavy minority population, only two-thirds of one percent—0.67%—of the value of the city's construction contracts had been awarded or subcontracted to minority-owned businesses in the previous five years (J.A. 41, 43). In light of this study, appellant's City Council was asked to adopt an ordinance requiring that 30% of its construction expenditures over the next five years be set aside for minority business enterprises (MBEs) (J.A. 11; J.S. App. 2a).

On April 11, 1983, the City Council held a public hearing concerning this proposed ordinance (J.A. 11). Proponents of the ordinance argued that the city had "not reached a successful or an admirable goal in terms of minority participation" in public construction contracting (*ibid.*); that there was "evidence of general discrimination—at least discriminatory effect in the entire industry—construction industry" (J.A. 15, 41); that local construction industry organizations in the city and state had few, if any, black members (J.A. 27-28, 34-35, 36-37, 39-40); and that, in a similar context, Congress enacted, and this Court upheld, a federal set-aside program for minority-owned businesses (J.A. 24, 25). Opponents of the ordinance argued that it would result in reduced competition and higher public construction costs (J.A. 19-21); that it would violate both Virginia law and the federal Constitution (J.A. 22-23); that the trade associations to which the proponents of the ordinance referred had not engaged in prior race discrimination (J.A. 20, 39); that comparisons between the percentage of minorities in the city's population and the percentage of minority businesses receiving public construction funds were not probative of prior discrimination by either the city or the construction industry (J.A. 30); and that, since only 4.7% of the construction firms in the country are minority owned, minority owned subcontractors were not available or qualified in sufficient numbers to allow prime contractors to satisfy the 30% MBE participation requirement (J.A. 32-36). At the close of the hearing, the nine-member City Council adopted the ordinance by a 6-2-1 vote (J.A. 49).

As adopted, the ordinance provides that "[a]ll contractors awarded construction contracts by the City shall subcontract at least thirty per cent of the contract to minority business enterprises" (J.S. Supp. App. 247). The ordinance defines an MBE to be a "business at least fifty-one per cent of which" is owned by "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts" (*id.* at 241-242 (italics deleted)). It allows the 30% MBE goal to be relaxed only "where a contractor can prove to the satisfaction of the director [of the city's Department of General Services] that the requirements herein cannot be achieved" (*id.* at 247). And it characterizes itself as "remedial and * * * [as being] enacted for the purpose o[f] promoting wider participation by minority business enterprises in the construction of public projects, either as general contractors or subcontractors" (*id.* at 248). By its terms, the ordinance expires on June 30, 1988 (*ibid.*).

2. In September 1983, appellant invited bids for the installation of stainless steel urinals and water closets in its jail (J.S. App. 2a). Appellee, J.A. Croson Company, a non-MBE plumbing and heating contractor based in Ohio, was the only bidder on the contract (*id.* at 2a-3a; J.S. Supp. App. 119-120). In preparing its bid, appellee attempted to subcontract 30% of the value of the contract to MBEs (*id.* at 120-124). But only one MBE was interested in participating and that MBE was unable to provide a timely price quotation (*id.* at 124). Appellee therefore submitted its bid without achieving the requisite 30% MBE participation and, instead, requested that appellant waive the MBE goal for this contract (J.S. App. 3a).

When the untimely minority subcontractor learned of appellee's request for a waiver, however, it notified appellant that it could in fact provide the plumbing fixtures required by the contract's specifications (J.S. Supp. App. 125). Appellant accordingly denied the requested waiver and directed appellee to submit a revised bid form (*id.* at 125-126). Appellee elected not to do so (J.S. App. 3a). Instead, it renewed its request for a waiver, arguing that, if it were required to use this minority sub-

contractor, the cost of the project would rise by $7,663.16 and its bid would have to rise along with it (*ibid.*). But appellant turned appellee down again, stating that the minority subcontractor was qualified and that the bid could not be increased (*ibid.*). Appellant subsequently decided to rebid the contract (*ibid.*).

3. Shortly thereafter, appellee instituted this action for monetary and injunctive relief under 42 U.S.C. 1981 and 1983,[1] arguing that the 30% MBE participation requirement violated both Virginia competitive bidding law and the Equal Protection Clause of the Constitution (J.S. App. 3a; J.S. Supp. App. 4, 112-114). On the parties' cross-motions for summary judgment, the district court ruled that the ordinance was consistent with both Virginia and federal law (*id.* at 112-232). On appeal, a divided panel of the Fourth Circuit affirmed (*id.* at 1-109). On petition for a writ of certiorari, however, this Court vacated the Fourth Circuit's judgment and remanded for further consideration in light of *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (J.S. App. 3a).

4. On reconsideration, a divided panel of the Fourth Circuit reversed and remanded (J.S. App. 1a-26a). It found (*id.* at 4a) that "[t]he very infirmities which marked the preferential provision in *Wygant* are present in this case."

First, the court determined (J.S. App. 6a-9a) that appellant had not established the predicate of prior discrimination by the city that the court said is necessary for justifying a preference program as being remedial in nature. It noted that "[t]he debate, at the very end of a five-hour council meeting, revealed no record of prior discrimination by the city in awarding public contracts, aside from some conclusory and highly general statements * * *" (*id.* at 6a). It added that "[t]he only other evidence purporting to show discrimination in the assignment of contracts [was the statistics] compar[ing] the percentage of minority contracts with the total number of minority residents

---

[1] Appellee originally brought the action in the Circuit Court of the City of Richmond, but appellant later removed it to federal district court. See J.S. Supp. App. 113. The court then consolidated the action with another suit against appellant. See *id.* at 129-138.

in the community" (*ibid.*); but it found that such "[g]eneral population statistics suggest, if anything, more of a political than a remedial basis for the racial preference," and that, after *Wygant*, "this is exactly the kind of evidence that will not pass muster" (*id.* at 6a-7a). And it stated (*id.* at 8a-9a) that, if appellant "thought it was permissible simply to adopt the contract set-aside program upheld by [this] Court in *Fullilove* v. *Klutznick*, 448 U.S. 448 * * * (1980)," "it was in error" to do so, since "[n]ational findings do not alone establish the need for action in a particular locality."

Second, the court found (J.S. App. 11a) that, even if the ordinance had a proper remedial predicate, it was "not narrowly tailored to that remedial goal," as required by *Wygant*. The court determined (*ibid.*) that "[t]he thirty percent goal was chosen arbitrarily," noting that "it was not tied * * * to a showing that thirty percent of Richmond subcontractors are minority-owned." It further found (*ibid.*) that "[t]he competitive disadvantage is far greater than the thirty percent minimum set-aside suggests," since, "[i]n many construction contracts, the dollar allocation among subcontractors will not break into a thirty percent block," and, in such situations, the ordinance will " 'unnecessarily trammel the rights of innocent individuals directly and adversely affected by the plan's racial preference' " (*ibid.* (citation omitted)). In addition, it found (*id.* at 12a) that "the definition of minority-owned business is itself not narrowly tailored to the remedying of past discrimination," noting that the definition in the ordinance "nearly duplicates the definition that drew fire in *Wygant*" (*ibid.*), and stating that "[a] record of prior discrimination against blacks by a governmental unit would not justify a remedial plan that also favors other minority races" (*ibid.*). Finally, it found (*id.* at 12a-13a) that, while "the presence of an expiration date and a waiver provision may help to narrow the scope of a plan's operation," "[w]hether the Richmond plan will be retired or renewed in 1988 is * * * nothing more than speculation" and "the waiver here [does not] cure the constitutional defects defined by the *Wygant* decisions," since a waiver "is to be granted 'only in exceptional circumstances' and as a matter of administrative discretion."

SUMMARY OF ARGUMENT

A. The ordinance at issue classifies on the basis of race and is therefore constitutionally suspect. The Court has, however, yet to reach a consensus on the appropriate constitutional analysis where race is used for remedial purposes. We believe that the Court should now hold that the standard of review applicable to remedial uses of race is the same as the standard of review applicable to non-remedial uses of such criteria—*i.e.*, that the racial classification must be "narrowly tailored" to achieve a "compelling" governmental interest. The Equal Protection Clause is a guarantee of equality to all individuals. Accordingly, the standard of justification for a racial classification should remain constant, regardless of the identity of the plaintiff or the articulated purpose of the classification.

B. This ordinance does not serve a compelling governmental interest. The ordinance's asserted interest in increasing MBE participation in local public construction projects is not, standing apart from any historical predicate justifying race consciousness, a legitimate governmental interest at all, much less a compelling one. Nor can the ordinance be justified as a remedy for prior discriminatory actions. While a state or local government has a compelling interest in remedying the effects of its own past and present discrimination, there is no basis for finding that appellant has engaged in any such discrimination; indeed, appellant does not even claim that such evidence exists. Moreover, while a state or local government has a compelling interest in remedying the effects of identified unlawful actions by private parties, appellant has not identified any such illegal acts of discrimination. It has at most identified race-neutral conditions perpetuating the effects of past discrimination. Accordingly, the ordinance cannot be justified as a remedy for unlawful discrimination by others in the local construction industry.

Even if appellant's ordinance could be justified by reference to unidentified acts of discrimination in the local construction industry, it would still fail for lack of narrow tailoring. Appellant has never attempted to address the problem of low minority participation—whatever its causes may be—by race-

neutral means. Appellant might have considered revising its bidding practices, adopting special advertising and outreach programs, authorizing special public financing, or providing training and certification for potential entrants to the industry. But it has not done so. Instead, it adopted a 30% set-aside that bears no relation to the percentage of qualified minority group members in the relevant pool of those able to participate as subcontractors. Its action imposes substantial burdens on nonminority contractors for a five-year period. Concomitantly, it does not provide adequate mechanisms to relieve nonminority contractors of the program's harsh effects, to relieve contractors with no history of discrimination of the program's requirements, or to disqualify MBEs that are not suffering the effects of prior discrimination from receiving the program's benefits.

C. The decision in *Fullilove* v. *Klutznick, supra,* does not indicate that this ordinance is constitutional. The Court in *Fullilove* merely upheld the facial constitutionality of an MBE program, without addressing the constitutionality of any concrete application of that or any other MBE program. Moreover, the program upheld in *Fullilove* is in critical respects different from the program in issue here. And, finally, the Court rested its holding in *Fullilove* on the special authority and competence of Congress to address at a national level in broad-brush terms a problem of overriding national interest—*i.e.,* the need to redress an unyielding pattern of discrimination against minority contractors in many parts of the nation. That overriding national interest was said to justify a federal statute touching the outer limits of congressional authority and constrained only by the Due Process Clause of the Fifth Amendment. It does not justify a racial classification by a city directly constrained by the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

THE RICHMOND CITY ORDINANCE, WHICH REQUIRES EVERY NONMINORITY PRIME CONSTRUCTION CONTRACTOR TO SUBCONTRACT AT LEAST 30% OF THE VALUE OF ITS CITY CONTRACTS TO MINORITY BUSINESS ENTERPRISES, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Appellant contends that its ordinance requiring every nonminority prime construction contractor to subcontract at least 30% of the value of its city contracts to MBEs is consistent with the Equal Protection Clause of the Fourteenth Amendment. Based on our understanding of the scrutiny required by that Clause, the substantive constraints that the Clause imposes on state and local governments, and the purposes and operation of this ordinance, we submit that this Court should reject appellant's contention.

A. Laws Which Classify On The Basis Of Race Should Be Sustained Only If "Narrowly Tailored" To Achieve A "Compelling" Interest, Regardless Of The Identity Of The Plaintiff Challenging Them Or The Purpose For Which They Are Adopted

The ordinance at issue in this case gives a preference to black, Hispanic, Oriental, Indian, Eskimo, and Aleutian contractors. It plainly classifies on the basis of race and is thus in tension with the fundamental principles embodied in the Equal Protection Clause that skin color and national origin are generally inappropriate bases upon which to rest official distinctions between people. *Brown* v. *Board of Educ.*, 347 U.S. 483, 493-495 (1954); *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944); *Strauder* v. *West Virginia*, 100 U.S. 303, 307-308 (1879). Accordingly, under the Court's modern equal protection cases, the ordinance is constitutionally suspect. See *Palmore* v. *Sidoti*, 466 U.S. 429, 432-433 (1984); *Loving* v. *Virginia*, 388 U.S. 1, 10-11 (1967).

The Court has made clear, of course, that, while suspect, government action based on race is not always constitutionally invalid. See, *e.g.*, *Korematsu* v. *United States*, 323 U.S. 214

(1944); see also *Lee* v. *Washington*, 390 U.S. 333, 334 (1968) (Black, Harlan, Stewart, JJ., concurring). A court of equity may, for example, permissibly take race into account in remedying past acts of intentional, unlawful discrimination on the basis of race. See, *e.g.*, *United States* v. *Paradise*, No. 85-999 (Feb. 25, 1987); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Similarly, a competent governmental authority may permissibly take race into account in remedying its own identified history of prior illegal discrimination. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion). And a state may permissibly take race into account in ensuring that its reapportionment plan complies with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. See *United Jewish Orgs.* v. *Carey*, 430 U.S. 144, 160 (1977). But " '[d]istinctions between citizens solely because of their ancestry' * * * [are] 'odious to a free people whose institutions are founded upon the doctrine of equality' " (*Loving* v. *Virginia*, 388 U.S. at 11, quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)). And on that account, in many cases covering a wide range of circumstances, the Court has unanimously ruled that, to pass constitutional muster, a law classifying on the basis of race or ethnicity ordinarily "must be justified by a compelling governmental interest and must be 'necessary * * * to the accomplishment' of [its] legitimate purpose" (*Palmore* v. *Sidoti*, 466 U.S. at 432-433 (citation omitted)).

The Court, however, "has yet to reach consensus on the appropriate constitutional analysis" to be applied where a race or ethnic classification is invoked to achieve a remedial purpose (*United States* v. *Paradise*, slip op. 14-15). Several Justices have said that the level of judicial scrutiny should not change in the remedial context and that even the remedial use of race or ethnicity must be "narrowly tailored" to the accomplishment of a "compelling" governmental purpose. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 273-274 (plurality opinion); *United States* v. *Paradise*, slip op. 1 (O'Connor, J., dissenting, joined by the Chief Justice and Scalia, J.). Other Justices, by contrast, have said that, while elevated judicial scrutiny is necessary, the

"remedial use of race is permissible if it serves 'important governmental objectives' and is 'substantially related to achievement of those objectives' " (*Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 301-302 (citation omitted) (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.)). The remaining Justices have not clearly settled on a standard of review for remedial uses of race.[2]

---

[2] Justice Stevens has rejected the argument that a district court's remedial use of race must be "narrowly tailored to achieve a compelling governmental interest" (*United States* v. *Paradise*, slip op. 2 (Stevens, J., concurring in the judgment)). But he did so on the ground that equitable decrees of federal courts are ordinarily subject to an "abuse of discretion" standard and that "a uniform standard should govern our review of all such decrees entered by District Courts" (*id.* at 6-7 n.4). At the same time Justice Stevens expressly recognized (*ibid.*) that the review of remedial court orders "is dramatically different from the question whether a statutory racial classification can be justified as a response to a past societal wrong." He has indicated that, in the instance of statutory classifications, a more exacting level of judicial scrutiny is appropriate—one that ascertains whether the purpose of the racial classification is constitutionally legitimate, whether the procedures used to adopt the ordinance were thorough and fair, whether the classification shows disrespect for, or imposes an unfair burden on, any person, and whether the classification is "narrowly tailored" to achieve its objective. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 317-320 (Stevens, J., dissenting); *Fullilove* v. *Klutznick*, 448 U.S. at 537-539, 548-554 (Stevens, J., dissenting).

Justice White has not clearly indicated the standard of review that he would apply to remedial uses of race. Without specifying a standard of review, he has twice voted to hold invalid certain remedial uses of race by government. See *United States* v. *Paradise*, slip op. 1 (White, J., dissenting); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 294-295 (White, J., concurring in the judgment). By contrast, in *Fullilove* v. *Klutznick*, he voted to uphold the constitutionality of an MBE preference enacted by Congress; but, in doing so, he joined with Chief Justice Burger in declining (448 U.S. at 491-492) to "adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265 (1978)." And in *Bakke*, where he voted to uphold the constitutionality of the affirmative action measure in issue, Justice White joined (438 U.S. at 387 n.7) both Part III-A of Justice Powell's opinion, which said that all uses of race by government must be subjected to the strictest of judicial scrutiny (438 U.S. at 287-291), and Justice Brennan's opinion, which indicated that the remedial use of race by government may be sustained if it is "substantially related" to

The lower courts need guidance on this issue and, for the reasons set forth in our *Wygant* brief (at 9-22),[3] we believe that the Court should now hold that the standard of review of racial or ethnic statutory classifications is the same regardless of the purpose underlying it or the groups at which it is directed—*i.e.*, the racial or ethnic classification must be "narrowly tailored" to the accomplishment of a "compelling governmental interest." That a governmental classification has a remedial objective may make the classification more likely to withstand judicial scrutiny, but the level of judicial scrutiny should not change. Accord *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 n.9 (1982); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 285-286 (O'Connor, J., concurring). The Equal Protection Clause is a guarantee of equality to all individuals. See *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886). "If it is the individual who is entitled to judicial protection against classifications based on his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then * * * the standard of justification [should] remain constant" (*Regents of the Univ. of California* v. *Bakke*, 438 U.S. at 299 (opinion of Powell, J.)). Accord *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 273-274 (plurality opinion); cf. *United States* v. *Paradise*, slip op. 7 n.4 (Stevens, J., concurring in the judgment) ("a uniform standard should govern our review of the merits of an equal protection claim"). See generally Days, *Fullilove*, 96 Yale L.J. 453 (1987).

B. Appellant's Ordinance Is Not "Narrowly Tailored" To The Accomplishment Of A "Compelling" Governmental Purpose

The question for decision in this case, therefore, has two components: first, whether any "compelling" governmental interest on appellant's part may reasonably be found to

---

the achievement of "important governmental objectives" (438 U.S. at 356-362).

Justice Kennedy has yet to express an opinion concerning the standard of review applicable to the remedial use of race.

[3] We are providing counsel for appellant and appellee with copies of our *Wygant* brief.

justify its MBE preference program; and, second, whether appellant's MBE preference program is "narrowly tailored" to the accomplishment of that compelling governmental purpose. We submit that both of these questions should be answered in the negative.

1. Three justifications have been offered for this ordinance. First, the ordinance itself proclaims that it is "remedial and is enacted for the purpose or [*sic*] promoting wider participation by minority business enterprises in the construction of public projects, either as general contractors or subcontractors" (J.S. Supp. App. 248). Second, the dissent below and at least one of appellant's amici suggest (J.S. App. 18a-21a; Lawyers' Comm. For Civil Rights Under Law, *et al.* Br. 22-24) that the ordinance can be justified as a remedy for the city's own prior discrimination in the awarding of public construction contracts. Finally, appellant argues (Br. 20-33) that the ordinance is a remedy for the effects of prior discrimination in the local construction industry. On the record as it stands, none of these asserted interests is sufficient to sustain this racial classification.

a. The interest in increasing MBE participation in the construction of public projects is not, standing apart from any historical predicate justifying race consciousness, a legitimate governmental interest, much less a compelling one. While the government has a legitimate interest in ensuring equal access of all races to construction projects involving public funds, and in remedying prior identified discrimination, it has no legitimate interest in ensuring—as an end in itself—any specific representation of minorities in the construction of those projects. As Justice Powell explained in *Bakke* (438 U.S. at 307), "If [appellant's] purpose is to assure within its [local construction industry] some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

b. Nor can this ordinance be justified as a remedy for appellant's own prior discriminatory actions. To be sure, a state or local government has a compelling interest in remedying its own

past and present discrimination. See *United States* v. *Paradise*, slip op. 15; *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 274 (plurality opinion); *id.* at 288-294 (O'Connor, J., concurring). But no basis has been offered for finding that appellant has engaged in any such discrimination. The ordinance does not say that it is a remedy for prior discrimination by the city or identify any basis for believing that such discrimination has occurred. Nor did the members of the City Council in debating the ordinance refer to any instances of prior or present discrimination by the city. See, *e.g.*, J.A. 15-16. And, most importantly, the record does not provide "convincing evidence that remedial action is warranted" to correct discrimination in the city's awards of public construction contracts. *Wygant*, 476 U.S. at 277. Nor does even appellant itself suggest a basis for a contrary conclusion.[4]

c. Rather, appellant argues (Br. 19-20) that the ordinance is a remedy for discrimination that is attributable to others—specifically, private firms in the local construction industry. While it is permissible for a state or local government, in appropriate circumstances, to seek to remedy unlawful discrimination by others, appellant has not identified the acts of unlawful discrimination it is allegedly seeking to remedy. Accordingly, this race-based ordinance cannot be justified as a remedy for discrimination by others.

(1) State and local governments plainly have a legitimate interest in preventing race discrimination and in remedying past and present discrimination. See *Roberts* v. *United States*

---

[4] Amici plainly err in suggesting (see, *e.g.*, Lawyers' Comm. for Civil Rights Under Law, *et al.* Br. 13-15) that, where it purchases goods and services from firms in a particular industry, a city government may be held legally responsible for private discrimination occurring in that industry of which it is aware. Under the Equal Protection Clause, government may be held liable only for intentionally discriminatory actions (*Washington* v. *Davis*, 426 U.S. 229 (1976)), and " '[d]iscriminatory purpose' * * * implies more than intent as volition or intent as awareness of consequences.' " *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979).

Jaycees, 468 U.S. 609, 624 (1984).[5] Race discrimination deprives members of the communities that those governments represent of their individual dignity. Accord *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 250 (1964). Moreover, it denies the community as a whole the benefits associated with wide participation by all persons in political, economic, and cultural life. See *Roberts* v. *United States Jaycees,* 468 U.S. at 625. Accordingly, since at least the time of *Brown* v. *Board of Educ.,* 347 U.S. 483 (1954), this Court has recognized the compelling nature of the government's interest "in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination" (*Regents of the Univ. of California* v. *Bakke,* 438 U.S. at 307 (opinion of Powell, J.)), whether that "identified discrimination" is attributable to governmental or private parties. See *Roberts* v. *United States Jaycees,* 468 U.S. at 624-625; *Wygant* v. *Jackson Bd. of Educ.,* 476 U.S. at 274 (plurality opinion).

(2) On the other hand, the Court has been quite demanding regarding the showing that will serve as a predicate for a racial classification that purports to remedy prior discrimination. As Justices Powell and O'Connor have noted, the Court has never "held that societal discrimination alone is sufficient to justify a racial classification" (*Wygant* v. *Jackson Bd. of Educ.,* 476 U.S. at 274 (plurality opinion)). *Id.* at 288 (O'Connor, J., concurring). Societal discrimination is "an amorphous concept of injury that may be ageless in its reach into the past" (*Regents of the Univ. of California* v. *Bakke,* 438 U.S. at 307 (opinion of Powell, J.)), and "timeless in [its] ability to affect the future" (*Wygant* v. *Jackson Bd. of Educ.,* 476 U.S. at 276 (plurality opinion)). It has "no logical stopping point," because it "does not necessarily bear a relationship to the harm caused by prior discriminatory * * * practices" (*id.* at 275, 276). Thus, while

---

[5] It should be emphasized that *Roberts* is in sharp contrast to this case. In *Roberts,* the Minnesota Human Rights Act, far from authorizing special treatment on the basis of race or gender, prohibited any such discrimination, and did so as a remedy for a previously existing pattern of discriminatory treatment. 468 U.S. at 623-624.

there is no "doubt[ ] that there has been serious racial discrimination in this country," a plurality of four Justices in *Wygant* held that, "as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive" (*id.* at 276 (emphasis in original)). And while Justice White did not join the plurality's opinion, there is reason to believe that he agreed with the plurality on this point. See *id.* at 295 (White, J., concurring in the judgment) ("[n]one of the interests asserted by the [government], singly or together, justif[ied] th[e] racially discriminatory layoff policy and save[d] it from the strictures of the Equal Protection Clause").

(3) No opinion of this Court has explicitly defined the distinction between "societal discrimination," which is insufficient to justify a racial remedy,[6] and the kind of prior discrimination proof of which will justify recourse to a racial remedy. Since, however, that distinction has received particular emphasis in opinions of Justice Powell, it is not surprising that those opinions also provide the doctrinal basis for the distinction.

In *Bakke,* Justice Powell argued that this Court has "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations" (438 U.S. at 307). He explained (*id.* at 307-308) that "[a]fter such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined." He added that "[w]ithout such findings of constitutional or statutory violations, it cannot be said that the

---

[6] Societal discrimination would, no doubt, provide a legitimate justification for a non-race based mechanism that is rationally connected to its remedial goal. See generally *City of New Orleans* v. *Dukes,* 427 U.S. 297 (1976); cf. *Defunis* v. *Odegaard,* 416 U.S. 312, 337-340 (1974) (Douglas, J., dissenting).

government has any greater interest in helping one individual than in refraining from harming another" (*id.* at 308-309 (footnote omitted)). This conclusion is necessary, Justice Powell stated, because "[t]o hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step [the Court] ha[s] never approved" (*id.* at 310).

Justice Powell's concurring opinion in *Fullilove* reiterated (448 U.S. at 497) that "this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations." And he added (*id.* at 498) that "[b]ecause the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred."

The plurality opinion in *Wygant* also appears to rest on this theme. It rejected the effort of a public school board to justify its race-based layoffs by reference to the effects of prior societal discrimination. 476 U.S. at 274-276. It stated that such a racial classification can be justified only if the public employer has "sufficient evidence to justify the conclusion that there has been prior discrimination" inconsistent with the Constitution (*id.* at 277). Without such evidence, the opinion added, the public employer would simply be attempting to remedy prior "societal discrimination," and that is not a compelling justification for a racial classification (*id.* at 277-278).

(4) In short, under the view explicitly adopted by four Justices in *Wygant*, and quite possibly adhered to by Justice White as well, a racial classification can be justified as a remedy for prior discrimination, and thus satisfy scrutiny under the Equal Protection Clause, only if a prior history of unlawful discriminatory action, whose effects are to be remedied, has been identified with some particularity. Appellant has not done

so. Assuming for purposes of this case that a private person's racially-motivated refusal to contract with a minority-owned construction firm is unlawful (see Appellant Br. 30-31 & n.53, citing *Runyon* v. *McCrary*, 427 U.S. 160 (1976)), appellant has nonetheless failed to identify a single such act of discrimination.[7]

Appellant responds (Br. 20-21) that the substantial disparity between the percentage of city contracts awarded to minority businesses and the percentage of minorities in Richmond is evidence of discrimination.[8] But, for all that has been shown, that disparity is the result of many discrete and isolated decisions by many actors exercising their independent and unrelated authority to determine where to allocate scarce resources and capital—*e.g.*, city contracting officers awarding contracts, prime contractors entering into subcontracts, banks and bonding officers issuing loans and providing bonds, and minority and non-minority subcontractors seeking construction work. The simple percentage comparison advanced by appellant cannot support a conclusion of discriminatory intent in those numerous separate decisions, each made in distinct circumstances and for numerous (and perhaps entirely lawful) reasons, none of which appellant has considered or analyzed.

---

[7] Appellant errs in suggesting (Br. 27-28) that the district court made "findings" with respect to past discrimination that may not be overturned on appeal. The district court decided this case on cross-motions for summary judgment and thus was in no position to, and did not, make any findings of disputed fact. See C. Wright & A. Miller, *Federal Practice & Procedure* § 2575 (1971).

[8] At most, the claim sounds like the "societal discrimination" rejected in *Wygant*. Just as an amorphous assertion of unspecified discrimination levelled at society at large suggests no "compelling" basis for remedial action, so, too, a similarly amorphous claim of unspecified discrimination levelled at a particular industry at large fails to warrant this sort of legislative attention. Indeed, dispensing with the requirement for some measure of identification of past discrimination eviscerates the correlative requirement that the remedy for such discrimination be narrowly tailored.

Appellant's statistics are fundamentally defective in another sense as well. There is no reason to suppose that the racial composition of the relevant market of those available to undertake work as contractors and subcontractors in any way reflects the minority-nonminority breakdown of the population of Richmond. Construction is a skilled trade, and participation in construction contracting is limited by a bidder's ability, among other things, to obtain working capital, to meet bonding requirements, to follow bidding procedures, and to demonstrate an adequate "track record." The general population is not qualified to bid on and participate in public (or private) construction contracts. General population figures therefore provide no basis for inferring prior intentional discrimination by the industry, much less by any particular firm or firms in the industry. See *Hazelwood School Dist.* v. *United States,* 433 U.S. 299, 308 n.13 (1977). And, of course, if it is only this differential capacity that the city is seeking to remedy, then we are back again to societal discrimination.

Furthermore, construction contractors and subcontractors from outside of the City of Richmond, including appellee, which is an Ohio-based firm, apparently bid on and receive city construction contracts. The minority population outside of the City of Richmond is, however, much lower than either appellant's 50% minority population figure or its 30% MBE participation goal. Thus, even if general population figures were relevant, the Richmond city figures would not be the appropriate ones for use in a meaningful statistical comparison.

Appellant's testimonial evidence (Br. 23-27) provides no sounder basis for the city's program. The record reveals only "some conclusory and highly general statements made by a member of the public, a City Council member who supported the plan, and the City Manager" (J.S. App. 6a). "The member of the public who testified about discrimination was not even involved in the construction industry" (*ibid.*). The City Council member neither cited specific instances of discrimination nor

identified any perpetrators or victims. And the "City Manager's comments mainly had to do with the city of Pittsburgh" (*ibid.*). "Such meager evidence is not a sufficient finding of prior discrimination" by anyone (*ibid.*), much less by an entire industry.

Appellant cannot escape these deficiencies in its evidentiary base by noting (Br. 21-22) that the local construction industry trade associations have few, if any, black members. The record does not indicate that blacks have ever attempted to join these other industry organizations; that they have been denied membership because of their race; or that they have failed to apply because they reasonably believed that they would be denied membership because of their race. On the contrary, the record indicates that only 4.7% of the construction firms in the country are minority-owned, and that 41% of these firms are concentrated in California, Illinois, New York, Florida, and Hawaii (J.A. 35). In these circumstances, one would not expect the various local trade associations to have many black members. There are not many black-owned construction firms to begin with, and these few firms have concentrated their business activities elsewhere.

Nor can appellant escape the deficiencies in its evidence by noting (Br. 22-24, 33-38) that minorities, having for many years been purposely excluded from employment in the construction industry (presumably also in the Richmond area), on that account now face barriers to entry in this field because they have been prevented from obtaining the experience necessary to start construction businesses. This is, again, the "societal discrimination" claim rejected by this Court. Moreover, any such intentional discrimination in employment has been illegal since at least 1964 (see 42 U.S.C. 2000e *et seq.*), and appellant provides no evidence of a substantial unremedied recurrence of this discrimination since that time. Furthermore, the unintentional perpetuation of the effects of this past discrimination, which may result from imposition of certain race-neutral criteria in the

selection of subcontractors—*e.g.*, bonding requirements, experience requirements, working capital requirements—does not itself involve unlawful conduct (see *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375 (1982) (no disparate impact claims under 42 U.S.C. 1981)), and thus provides no basis for a race-conscious remedy. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 276 (plurality opinion); *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 434-439 (1976).[9]

Finally, appellant cannot properly justify its ordinance by reference (Br. 25-26) to the national pattern of discrimination that Congress identified and relied upon in enacting the 10% MBE participation requirement of the Public Works Employment Act of 1977 (PWEA), Pub. L. No. 95-28, 91 Stat. 116, which this Court upheld in *Fullilove* v. *Klutznick*, *supra*. The fact that Congress found a national pattern of discrimination in the construction industry does not absolve particular localities wishing to adopt race-conscious relief from identifying such discrimination in their areas. Moreover, as we read *Fullilove*, the fact that Congress in 1977 enacted a national program providing a basis for race-conscious relief for prior discrimination

---

[9] By contrast, certain employment practices which have a disparate impact may constitute a violation of Title VII, even though no discriminatory intent is shown. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). *United Steelworkers* v. *Weber*, 443 U.S. 193, 209 (1979); *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977). The same is not generally true outside the Title VII context. See *Washington* v. *Davis*, 426 U.S. 229 (1976) (Equal Protection Clause); *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375 (1982) (Section 1981).

Appellant errs in suggesting (Br. 30-31 n.53, 34-38) that the reasoning of cases decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*—such as *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987)—justify its race-based actions. Those cases merely address the permissibility of certain race-conscious actions by employers which may escape the strictures contained in *Title VII*; those cases do not address the permissibility of race-conscious action by employers in light of the prohibitions contained in the Equal Protection Clause. While Title VII and the Equal Protection Clause promote certain common objectives, this Court does "not regard as identical the constraints of Title VII and the federal constitution on voluntarily adopted affirmative action plans" (*Johnson* v. *Transportation Agency*, slip op. 14).

in the construction industry—with particular applications being justified case-by-case, on the basis of local history and circumstances (see *Fullilove,* 448 U.S. at 470-471)—does not of itself establish that there were discriminatory effects remaining in 1983 sufficient without more to justify the additional race-conscious remedy adopted here. Appellant has thus not shown that it was reasonable to rely in 1983 in Richmond on Congress's national findings made in 1977. See *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (government may rely on studies by other governments that are "reasonably" applied in its particular context). In particular, there is no basis for concluding that there were actual acts of unlawful discrimination whose effects remained uncorrected.[10]

2. Of course, even if appellant's ordinance could be justified by general reference to unspecified acts of discrimination in the local construction industry, it would still need to be "narrowly tailored" as necessary to remedy that alleged discrimination. The Court has indicated that, in determining whether a remedy is narrowly tailored, a number of factors are relevant: the necessity for the relief and the efficacy of alternative remedies; the relationship of any numerical requirements to available minority members in the relevant market; the effect of the remedy on third-persons; the planned duration of the remedy; and the availability of meaningful waiver provisions. Of these, surely the crucial factor should be that non-race-specific remedies have been or clearly would be unavailing. See *United States* v. *Paradise,* slip op. 19 (plurality opinion); *Local 28, Sheet Metal Workers Int'l Ass'n* v. *EEOC,* 478 U.S. 421, 475-481 (1986) (plurality opinion). Consideration of these fac-

---

[10] Requiring state or local governments to establish these facts by firm evidence—either contemporaneously or by proof at trial—will not discourage voluntary action by government to remedy violations of law. Cf. *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 290-293 (O'Connor, J., concurring). In these circumstances, government is not trapped between liability to minorities if affirmative action is not taken to remedy the apparent discrimination and liability to nonminorities if affirmative action is taken. Cf. *ibid.* It is the actions of non-governmental actors that are in question and thus the government need not be concerned about its own liability at all.

tors indicates that appellant's ordinance is not "narrowly tailored" to the accomplishment of its purported objective.

Appellant has no basis for suggesting either that its race-based ordinance was necessary or that race-neutral alternatives were unavailable. The record does not indicate that appellant ever considered, much less tried, less intrusive means of remedying any effects of the alleged prior discrimination in the local construction industry. There is no indication that appellant has ever reviewed its bidding practices to make sure that they are intelligible and accessible to all; that it has ever instituted special advertising and outreach programs to attract MBEs to its construction projects; that it has ever authorized special public financing for firms that have been or are unable to post bonds or to borrow money for reasons unrelated to their credit rating; or that it has ever provided training and certification programs to ensure that experience requirements do not bar entry into this field. On the contrary, appellant apparently turned to a race-based program without any effort whatever to put in place a less drastic remedy. Such a course is not constitutionally permissible. Cf. *United States* v. *Paradise*, slip op. 20-25 (non-victim-specific, race-conscious remedies appropriate only in instances of "egregious" discrimination); *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC, supra* (same).

Moreover, appellant chose a percentage set-aside that bears no reasonable relationship to the percentage of minority group members in the relevant market of businesses available to supply these services. The term "MBE" is defined in the ordinance to include businesses owned not only by blacks, but also by Hispanics, Orientals, Indians, Eskimos, and Aleuts. Thus, even if the disparity between the proportion of blacks in the population and the proportion of black-owned businesses receiving contracts was evidence of prior discrimination against blacks, the ordinance would still be unjustified as providing a race-based preference to groups that have not previously been discriminated against. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 284 n.13 (plurality opinion) (criticizing affirmative action plan for its "undifferentiated nature"). And, in all events, as we explained above, appellant has not shown the statistical

relevance of the 30% figure, or in any way sought to determine the actual make-up of the relevant subcontractor market, looking to geography and qualifications. Its 30% MBE requirement cannot, therefore, constitute a reasonable estimate of the amount of city contracting dollars that would have reached minorities in the absence of discrimination. See *Johnson* v. *Transportation Agency*, slip op. 7-8 (O'Connor, J., concurring in the judgment).[11]

Furthermore, the burden that the 30% MBE participation requirement requires nonminority construction firms to shoulder is substantial. The set-aside here is quite large and, unlike smaller set-aside programs, constitutes a significant denial of public contracting opportunities to non-minority contractors. Further, as the court below noted (J.S. App. 11a), "[i]n many construction contracts, the dollar allocation among subcontractors will not break into a thirty percent block." In that circumstance, the set-aside could easily amount effectively to a much higher percentage. That this denial affects the economic fortunes of businesses operating on the local level, where small businesses predominate, and where businesses live from subcontract to subcontract, only aggravates the ordinance's adverse effect. It means that the set-aside may have a substantial adverse effect on a number of businesses and require the layoff of innocent workers. The Court has made clear that such adverse effects are cause for serious constitutional concern. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 282-284 (plurality opinion); *id.* at 295 (White, J., concurring in the judgment); see also *Associated Gen. Contractors* v. *City & County of San Francisco*, 813 F.2d 922, 936 (9th Cir. 1987).

The duration of appellant's MBE preference further magnifies these tailoring problems. This ordinance is not a one-shot funding measure, enacted, as in *Fullilove*, to ward off the

---

[11] Indeed, the "piece of the action" (*Fullilove* v. *Klutznick*, 448 U.S. at 536 (Stevens, J., dissenting)) nature of this ordinance becomes clear when one appreciates that it is irrelevant to appellant's scheme that a business may have significant minority participation in its ownership or management, so long as it is less than 50% minority owned.

foreseeable effects of an imminent economic recession and to provide minority contractors with the experience necessary for continued success without governmental assistance. Cf. *Fullilove* v. *Klutznick*, 448 U.S. at 511-512 (Powell, J., concurring). Rather, it is a long-term element of appellant's construction contract award criteria. Appellant has committed itself to engaging in race discrimination for a five-year period, whether the prior discrimination that the preference allegedly seeks to redress is remedied before the end of that period or not.[12]

Finally, the waiver and exemption provisions of the ordinance do not cure the ordinance's overbreadth and other constitutional deficiencies. There is no exemption for nonminority contractors that can prove a history free of racial discrimination.[13] There is no adequate relief mechanism for nonminority contractors who are harshly affected by this ordinance's operation, or even for those who have significant minority participation in their management or ownership. And there is no disqualification of minority contractors who are not suffering from the effects of identified illegal discrimination—such as minority contractors who were formed after the enactment of this statute, or who have successfully vindicated their rights through suits under 42 U.S.C. 1981.[14] Such a law is not a "narrowly tailored" remedy for the past intentional exclusion of minorities from the construction industry, but rather a racial "bloc grant" of the kind deplored by Justice Powell in his *Wygant* opinion. See 476 U.S. at 281 n.8.

---

[12] The fact that the set-aside program is now scheduled to expire in June 1988 does not alter the fact that the Court must assess the constitutionality of a program projected at the time of enactment to be in place, and which has in fact been in place, for five years.

[13] The record provides, for example, no basis for believing the appellee, an Ohio-based contractor, played any role in discrimination in the local construction industry.

[14] The record does not suggest, for example, that the MBE that provided the untimely price quote in this case is itself a victim of identified discrimination in the past.

C. The Court's Decision In *Fullilove* Does Not Support The Constitutionality Of This MBE Preference Ordinance

Appellant and its amici respond (Br. 21 n.33, 24 n.39, 35-36 & n.60, 40; Nat'l League of Cities, *et al.*, Br. 7-14) that, in *Fullilove* v. *Klutznick, supra*, this Court approved an MBE preference program with all of the aforementioned features and that, accordingly, this ordinance must be approved as well. But appellant and its amici misunderstand both the basis for and the limited holding of the *Fullilove* decision.

In *Fullilove*, the Court faced the question whether the 10% MBE preference requirement of Section 103 of the PWEA (91 Stat. 117) was facially constitutional—*i.e.*, whether it could be constitutionally applied in a substantial number of situations. See 448 U.S. at 480-481 (plurality opinion); *Parker* v. *Levy*, 417 U.S. 733, 760 (1974). In seeking to answer this question, three Justices found that the PWEA was a stop-gap funding measure designed to offset the effects of an imminent recession (*id.* at 456-458); that MBEs had historically received a relatively small percentage of federal contracting funds and that Congress attributed much of this nonparticipation by minorities to purposeful discrimination by private and public contractors (*id.* at 458-463); see also *id.* at 506 (Powell, J., concurring)); that, since at least 1953, the federal government had unsuccessfully attempted through non-racial means to remedy this history of prior discrimination and to eliminate some of the barriers to MBE participation in federal contracting (*id.* at 463-467 (plurality opinion)); and that, as fleshed out by the responsible administrative agency, the PWEA accorded a preference in the competitive bidding process only to those MBEs whose inability to compete effectively could be attributed to the effects of identifiable race discrimination committed in the past (*id.* at 470-471). On these premises, the Court, with no majority opinion and three dissenting Justices, held that the MBE provision of the PWEA should be upheld against a facial constitutional challenge. See *id.* at 473-492; *id.* at 517-522 (Marshall, J., concurring in the judgment).

In reaching this judgment, however, the Justices casting the determinative votes made clear that they were not addressing any questions relating to specific applications of the MBE program. *Fullilove* v. *Klutznick*, 448 U.S. at 480-481. Indeed, they specifically declined to address whether the Constitution requires a more specific identification of perpetrators, victims, and/or discriminatory acts before a racial preference may actually be implemented in any particular case. See *id.* at 486-488 & n.73 (opinion of Burger, C.J.). That, of course, is the precise question that appellee has raised here in challenging the application of appellant's ordinance to it.

Moreover, the MBE preference program approved in *Fullilove*, is, as just discussed, quite different from the MBE preference program at issue here. As Chief Justice Burger characterized it, the national MBE preference program approved in *Fullilove* was enacted by Congress at least in part as a remedy for an identified history of purposeful discrimination against MBEs by private and public contracting agencies; here, as explained above, no such history of identified purposeful discrimination against minority contractors has been sufficiently established, and certainly no such history of identified discrimination traceable to appellee.[15] Similarly, as the plurality

---

[15] Appellant and amici protest (Appellant Br. 21 n.33; Nat'l League of Cities, *et al.* Br. 7-8) that the statistical disparity relied upon by appellant in enacting this ordinance is identical to the statistical disparity relied upon by Congress in enacting Section 103 of the PWEA. But Congress relied upon the statistical disparity cited by appellant and its amici only as a basis for suggesting, as a general matter, that a race-conscious remedy was necessary in order to remedy instances of prior intentional discrimination to be addressed in particular cases as established in the course of the detailed administration of the program. Congress did not rely upon the statistical disparity to establish the history of identified discrimination necessary to justify any particular, actual race-conscious contract award. See 448 U.S. at 459, 462-463 (plurality opinion); *id.* at 504-506, 511 (Powell, J., concurring).

Appellant and amici likewise err in suggesting (Appellant Br. 23, 26-27; Nat'l League of Cities, *et al.* Br. 9) that the nonstatistical evidence relied upon by appellant is identical to the nonstatistical evidence relied upon by Congress in enacting Section 103 of the PWEA. The two situations simply are not comparable. Appellant relied upon general and conclusory observations by three

characterized it, the MBE program approved in *Fullilove* was appropriately tailored to accomplish its remedial goal. The government had already unsuccessfully attempted to remedy, by race-neutral measures, the prior discrimination it found; the race-based measure adopted was a one-shot measure enacted in the face of an oncoming recession; at 10%, the set-aside required non-minority contractors to shoulder a lighter burden than in the present case; and, most significantly, the MBE preference was no more than a presumption (*i.e.*, in application, the set-aside could be waived where an MBE was not suffering from the effects of prior illegal discrimination). As discussed above, appellant's MBE program is not tailored in this fashion.

In any event, the MBE preference program approved in *Fullilove* is embodied in an Act of Congress, not in a city ordinance, and thus, in a constitutional sense, is fundamentally different from this ordinance. Congress has broad remedial powers deriving from the enforcement provisions of the Thirteenth and Fourteenth Amendments and the Commerce and Spending Clauses. See *Fullilove* v. *Klutznick*, 448 U.S. at 472-475, 483-484, 490 (opinion of Burger, C.J.); *id.* at 500, 508-510, 516-517 (Powell, J., concurring). Moreover, the Equal Protection Clause was expressly adopted to limit the authority of state and local governments (and not the federal government) to use race in making governmental decisions. Acts of Congress, by contrast, are restrained by the equal justice component of the Due Process Clause of the Fifth Amendment. While that provision places restraints on Congress and the President that are similar to those the Equal Protection Clause places on state and local governments, "the two protections are not always coextensive," and the Court has recognized that "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State."

---

persons at a city council hearing. Congress relied upon studies done over a lengthy period of time by various legislative committees and administrative agencies. See 448 U.S. at 456-467 (plurality opinion).

Hampton v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976).[16] In *Fullilove*, the Court found such an overriding national interest—*i.e.*, the need to remedy the economic inequality attributable to an unyielding nationwide pattern of past discrimination—and, in view of the unique powers of and limitations on the Congress, was thus impelled to approve a racial criterion even though it "press[ed] the outer limits of congressional authority" (448 U.S. at 490). See also *id.* at 483. No such congressional powers or determination of national interest is implicated here, and the city government is constrained directly by the Equal Protection Clause of the Fourteenth Amendment. Especially in view of these circumstances, the ordinance's use of racial criteria cannot be sustained.[17]

---

[16] This is reasonable in part due to the indirect protections that individuals derive when power is located in an office of government responsible to all who can be affected by its exercise, which is true of Congress, but not of state and local governments, where parochial interests may sometimes hold much more uninhibited sway. See *Associated Gen. Contractors* v. *City & County of San Francisco*, 813 F.2d at 928-934; see generally, *The Federalist* No. 10, at 22 (J. Madison) (C. Rossiter ed. 1961).

[17] Amicus Nat'l League of Cities, *et al.* errs in suggesting (Br. 9-10, 19-21) that state and local governments should not be required to make more detailed findings concerning prior discrimination than those made by Congress in justifying the 10% MBE preference of the PWEA. Congress legislates with respect to problems of great scope and, accordingly, should not have to confine its vision to the facts and evidence adduced by particular parties, but should be able to paint with a broad brush in its legislative action. State and local governments, by contrast, operate on a substantially smaller scale. It is therefore reasonable to require them to bear a greater burden of justification in defending race-based actions. Accord *Fullilove* v. *Klutznick*, 448 U.S. at 515-516 n.14 (Powell, J., concurring) ("[t]he degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies * * * var[ies] with the nature and authority of a governmental body"). Indeed, the language and purpose of the Equal Protection Clause would seem to require as much. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 273-278 (plurality opinion).

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

CHARLES FRIED
Solicitor General
WM. BRADFORD REYNOLDS
Assistant Attorney General
DONALD B. AYER
Deputy Solicitor General
ROGER CLEGG
Deputy Assistant Attorney General
GLEN D. NAGER
Assistant to the Solicitor General
DAVID K. FLYNN
MICHAEL P. SOCARRAS
Attorneys

JUNE 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60404